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No. 80-1437

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE, PETITIONER

v.

ARTHUR EDWARD SHEEHAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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The narrow question presented by this case and its companion, *Army and Air Force Exchange Service* v. *Gorman*, No. 80-1435 (filed Feb. 23, 1981), is whether an appointed employee of a military exchange who has been discharged may file a civil action for monetary damages against the United States under the Tucker Act (28 U.S.C. 1346(a)(2)) predicated upon an implied-in-fact contract. As we demonstrated in our petition in this case (at 4-14), the court of appeals' holding that Tucker Act jurisdiction may be invoked in such a situation is inconsistent with the Court's decisions in *United States* v. *Hopkins*, 427 U.S. 123 (1976), and *United States* v. *Testan*, 424 U.S. 392 (1976).

1. Respondent's contention (Br. in Opp. 9-12) that the decision in *Hopkins* supports the court of appeals' decision in this case is mistaken. In *Hopkins*, this Court held that the Court of Claims had erred in concluding "that AAFES

employees could *never* serve by appointment." 427 U.S. at 130 (emphasis in original). The Court noted (*id.* at 127-128) that Congress recognized that exchange service employees may be appointed to their positions, and that under one set of AAFES regulations (AR 60-21/ AFR 147-15 (Nov. 12, 1974)) "ordinary" employees hold their positions by appointment. In addition, the Court pointed to a different set of AAFES regulations (AR 60-20 / AFR 147-14 (Mar. 21, 1974)) that govern the employment of persons under service contracts to perform "direct service," including "janitorial and window cleaning service," and it noted that exchange service employees are specifically prohibited from receiving service contracts. 427 U.S. at 128-129. The Court in *Hopkins* concluded that resolution of the question whether Hopkins was employed pursuant to a contract "depends upon an analysis of the statutes and regulations" governing the employment of AAFES personnel in light of the evidence to be adduced on remand concerning Hopkins' particular status. *Id.* at 130. Because the regulations cited by this Court in *Hopkins* as applying to appointed employees are the same regulations that govern respondent's employment with the AAFES (see Pet. App. 7a-8a & n.8), it is clear that respondent was employed pursuant to "appointment." Under *Hopkins*, therefore, the district court lacked jurisdiction over respondent's claims for monetary relief.

2. Respondent attempts to avoid the implications of the decisions in *Hopkins* and in *United States* v. *Testan, supra*, by asserting (Br. in Opp. 6, 12, 13) that, unlike the employees in those cases, he was employed by contract as the result of his participation in the AAFES' Executive Management Program ("EMP"). This claim is without merit.

In the first place, the complaint nowhere alleges that respondent was employed pursuant to a contract with the AAFES or that "his discharge constituted a breach of a contract of employment." *United States* v. *Hopkins, supra*,

427 U.S. at 130.[1] To be sure, the complaint states that "[a]s an EMP employee, [respondent] had certain special obligations and special benefits different from other AAFES employees." Complaint, para. 5. But the special obligations and benefits applicable to AAFES employees who are designated to EMP status are set forth in the regulations governing *appointed* AAFES employees (AR 60-21/AFR 147-151, Chapter 5, Section II (Nov. 12, 1974)) and are insufficient to convert the status of a government employee from that of serving pursuant to appointment to that of serving pursuant to a contract. If the law were otherwise, the distinction between appointed and contract employees would disappear, since all government employees, regardless of whether they are appointed or are employed by contract, incur certain obligations and receive certain benefits in connection with their employment.

Indeed, the court of appeals expressly noted (Pet. App. 8a) that respondent's complaint did not refer to an employment contract, and the court assumed that the pertinent AAFES regulations "label the *commencement* of [respondent's] employment as pursuant to 'appointment' " (*ibid.*; emphasis in original). Thus, the theory of the court below was not that the AAFES' regulations governing EMP employees established a contractual relationship, but that the regulations concerning discharge procedures "were part of a collateral implied in-fact contract between [respondent] and the AAFES that the AAFES would adhere to the

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[1] As we noted in the petition (at 9 n.8), subsequent to the decision in *Hopkins*, the Court of Claims has, on two occasions, dismissed suits for back pay brought by discharged exchange service employees under the Tucker Act on the ground that the complaints failed to allege facts establishing a contract relationship and that therefore the court was without subject matter jurisdiction over the action. See *Spooner* v. *United States*, 211 Ct. Cl. 312 (1976); *Richardson* v. *United States*, 214 Ct. Cl. 757 (1977).

regulations in its dealings with him" (*ibid.*). If the court of appeals had accepted respondent's contention that respondent had entered into an employment contract by virtue of his status as an EMP employee, it would have been unnecessary for that court to have resorted to the fiction of an implied-in-fact contract, a fiction that, as we have demonstrated in the petition, is not tenable in light of *Hopkins* and *Testan*.

For the foregoing reasons and for the reasons stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief.

Respectfully submitted.

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